

4-1.000

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4-1.100 Responsibilities of the Attorney General re Civil Litigation

The Office of the Attorney General was established by the Judiciary Act of 1789. Act of September 24, 1789, 1 Stat. 73. Section 35 of that Act vested the Attorney General (AG) with plenary authority to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and to give advice and opinions upon questions of law when requested by the President or the heads of various Departments.

The AG's statutory authority to conduct litigation to which the United States, its departments or agencies is a party was expanded and more fully developed by Congress in 1870 in the same legislation that provided for the creation of the Department of Justice Act of June 22, 1870, 16 Stat. 162. Among other things, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, and required them to

call upon the Department of Justice. . . and no counsel or attorney fees shall hereafter be allowed to any person. . . besides the respective district attorneys. . . for services in such capacity to the United States. . . unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services could not be performed by the Attorney-General. . . or the officers of the Department of Justice.

...

Section 17, 16 Stat. 164.

The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly-paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States ("a unity of decision, a unity of jurisprudence in the executive law of the United States"), and to provide the AG with authority over lower court proceedings involving the United States so that litigation would be better handled on appeal, and before the Supreme Court. *See* Cong. Globe, 41st Cong., 2d Sess. 3035-39, 3065-66 (1870). *See generally* Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, Or One Among Many?", 46 Fordham L. Rev. 1049 (1978); Key, "The Legal Work of the Federal Government," 25 Va. L. Rev. 165 (1938). *See also* *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government"); *Perry v. United States*, 28 Ct. Cl. 483, 491 (1893); *Sutherland v. International Insurance Co.*, 43 F.2d 969, 970-71 (2d Cir. 1930), *cert. denied*, 282 U.S. 890 (1930).

The present statutory authority vesting plenary litigating authority with the Attorney General, including 28 U.S.C. §§ 516, 519 and 5 U.S.C. § 3106, parallels that found in the 1870 Act. Except as otherwise authorized by law, only attorneys of the Department of Justice under the supervision of the Attorney General may represent the United States or its agencies or officers in litigation. Counsel for other government agencies may not be heard in opposition. *See In re Confiscation Cases*, 74 U.S. 454, 458 (1868); *The Gray Jacket*, 72 U.S. 370, 371 (1866). Nor, in the absence of statutes to the contrary, may any suit be brought on behalf of the United States except by the Attorney General or an attorney under his/her superintendence. *Sutherland v. International Ins. Co.*, *supra*; *F.T.C. v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *I.C.C. v. Southern Railway Co.*, 543 F.2d 534 (5th Cir. 1976), *reh. en banc denied*, 551 F.2d 95 (5th Cir. 1977). The completeness of the Attorney General's authority is further illustrated by the fact that once a matter has been referred to the Department of Justice, the referring agency ceases to have control over it. *See United States v. Sandstrom*, 22 F. Supp. 190, 191 (N.D. Okla. 1938).

See USAM 4-3.000 et seq. for additional authorities with respect to the Attorney General's inherent authority to compromise and close civil cases. Presidential Reorganization Plan No. 2 of 1950, 64 Stat. 1261, effected a Hoover Commission type reorganization whereby all functions of other employees and units in the Department,

including Presidential appointees, were placed in the Attorney General to be redelegated by him/her. *See* 28 U.S.C. § 509, which is of continuing effectiveness, parallels the language of Reorganization Plan No. 2, and provides that "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ."

4-1.200 Responsibilities of the Assistant Attorney General for the Civil Division

The Attorney General has delegated to the Assistant Attorney General for the Civil Division authority for the conduct, handling or supervision of the matters catalogued at 28 C.F.R. § 0.45, as well as those in 28 C.F.R. § 0.47 (alien property matters), 28 C.F.R. § 0.49 (international judicial assistance), 28 C.F.R. § 0.171(a) (collection of judgments, fines, penalties and forfeitures), and 28 C.F.R. § 0.46, "all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned. . . ." (emphasis supplied).

4-1.210 Responsibilities of Organizational Units in the Civil Division

The majority of civil litigation in certain categories is handled in the field by United States Attorneys (USA) under the ultimate and overall responsibility of the Assistant Attorney General for the Civil Division. The litigation not handled by United States Attorneys is assigned primarily to components within the Civil Division, subject to the supervision and direction of the Assistant Attorney General. These components are the Torts Branch, Commercial Litigation Branch, Federal Programs Branch, Office of Immigration Litigation, Office of Consumer Litigation, and the Appellate Staff, each of which is directed by a Deputy Assistant Attorney General and a management team of senior supervisory attorneys. The specific matters assigned to each component, insofar as they may be significant to the United States Attorneys, are summarized in USAM 4-1.211 through 4-1.217.

The compromise and closing authority exercised by the Assistant Attorney General and subordinate Civil Division officials is described in USAM 4-3.110.

4-1.211 Torts Branch

The Torts Branch represents the United States, its agencies, and persons sued in their individual capacities when government representation is appropriate in suits sounding in tort. This includes not only suits under the Federal Tort Claims Act, but also litigation under the Suits in Admiralty and Public Vessels Act, as well as suits seeking money damages against individual government employees. *See* 28 C.F.R. § 0.45. The Torts Branch also handles some contract matters in the environmental area.

Four Staffs are responsible for the Torts Branch's litigative responsibilities as follows:

Aviation and Admiralty

Post Office Box 14271
Benjamin Franklin Station
Washington, D.C. 20044-4271
(202) 616-4000

Constitutional and Specialized Torts

Post Office Box 7146
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4140

**Environmental Torts (formerly Environmental
& Occupational Disease Litigation) Staff**

Post Office Box 340
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4200

FTCA Staff

Post Office Box 888
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4400

NOTE: Federal Torts Claims Act matters pertaining to aviation or environmental issues are within the responsibilities of the Aviation and Admiralty and Environmental Torts staffs, respectively. All other FTCA matters are the responsibility of the FTCA Staff.

4-1.212 Commercial Litigation Branch

The Commercial Litigation Branch is responsible for litigation arising principally from a broad variety of governmental undertakings of a "commercial" nature. The work of this Branch encompasses contract actions, whether brought by or against the government; most affirmative monetary and property claims (including foreclosures, reclamation claims, and actions to recover damages for conversion of government property) arising from government loan, grant, subsidy, and insurance programs; all non-tax bankruptcy litigation; and a broad variety of other monetary litigation, including patent or copyright infringement suits. The Branch is also responsible for the government's affirmative civil claims arising from fraud and bribery and other official misconduct, as well as for the collection of civil fines and penalties in the areas assigned to the Civil Division. Commercial Litigation Branch attorneys handle all commercial litigation in the United States Court of Federal Claims, the United States Court of Appeals for the Federal Circuit, and the United States Court of International Trade. *See* 28 C.F.R. § 0.45. The Office of Foreign Litigation is part of the Commercial Litigation Branch.

4-1.213 Federal Programs Branch

The Federal Programs Branch represents the United States, its agencies and officials in a broad range of litigation involving the constitutionality of federal statutes and the administration of statutory and other federal programs by federal agencies. This includes litigation against Cabinet officers and agencies under the Administrative Procedure Act, and institution of affirmative suits to enforce federal laws or regulations or to impose civil penalties. The Branch handles cases involving national security and defense, personnel issues and discrimination claims, government information and privacy suits, housing and human services cases, and miscellaneous claims challenging other programmatic activities of agencies. Most of the defensive litigation seeks injunctive or declaratory relief.

4-1.214 Appellate Staff

The Appellate Staff is responsible for the appellate work within the jurisdiction of the Civil Division.

The basic functions performed by the Appellate Staff include:

- A. Briefing and arguing cases in the United States Courts of Appeals and various state appellate courts;

B. Preparation of memoranda from the Assistant Attorney General to the Solicitor General recommending for or against appeal, or for or against rehearing en banc or certiorari in cases where the government has lost in the lower courts;

C. Preparation of draft merits briefs, petitions for certiorari, and briefs in opposition in Civil Division cases in the Supreme Court;

D. Providing advice and assistance to persons within the Civil Division, other components of the Department of Justice, United States Attorneys' offices, senior Department officials, and client agencies.

Contacts:

Robert E. Kopp, **Director**, (202) 514-3311.

William G. Kanter, **Deputy Director**, (202) 514-4575.

Assistant Directors: Barbara C. Biddle, (202) 514-2541; Robert S. Greenspan, (202) 514-5428; Barbara L. Herwig, (202) 514-5425; Leonard Schaitman, (202) 514-3441; Michael Jay Singer, (202) 514-5432; Anthony J. Steinmeyer, (202) 514-3388.

Appellate Litigation Counsel: Douglas N. Letter, (202) 514-3602; Mark B. Stern, (202) 514-5089.

Special Counsels: John F. Daly, (202) 514-2496; Marleigh D. Dover, (202) 514-3511; John C. Hoyle, (202) 514-3469; Jacob M. Lewis, (202) 514-5090; Scott R. McIntosh, (202) 514-4052.

Senior Appellate Counsels: Freddi Lipstein, (202) 514-4815; Alfred R. Mollin, (202) 514-0236.

4-1.216 Office of Consumer Litigation

All functions and responsibilities formerly assigned to the Consumer Affairs Staff of the Antitrust Division, including responsibility for criminal cases (48 Fed. Reg. 9522 (1983)), are now the responsibility of the Civil Division's Office of Consumer Litigation. The Office coordinates district court litigation referred to the Department by the Federal Trade Commission, the Food and Drug Administration, National Highway Traffic Safety Administration, and the Consumer Product Safety Commission. Pertinent statutes include the Federal Food, Drug, and Cosmetic Act, Federal Trade Commission Act, the Disclosure of Automobile Information Act, the odometer requirements section of the Motor Vehicle Information and Costs Savings Act, the Consumer Credit Protection Act, and the Consumer Product Safety Act. *See* 28 C.F.R. § 0.45(j).

4-1.217 Office of Immigration Litigation

Because of the transfer from the Criminal Division (48 Fed. Reg. 9522 (1983)) of certain litigation arising under the Immigration and Nationality Act, the Civil Division has established an Office of Immigration Litigation. The Office has assumed the Department's responsibility for virtually all civil litigation arising under the immigration laws, including court of appeals petitions for review of final removal orders, and citizenship and visa disputes, matters pertaining to legalization and employer sanctions under the Immigration Reform and Control Act, Pub.L. No. 99-603 (Nov. 6, 1986), 100 Stat. 3359, and cases arising under the enforcement reforms of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. No. 104-828, 110 Stat. 3009 (Sept. 30, 1996). The Criminal Division retains jurisdiction over criminal cases, denaturalization cases concerning persons believed to have been involved in Nazi war crimes, civil INS forfeiture actions and remission petitions, and certain other civil matters bearing on criminal law enforcement. *See* 28 C.F.R. § 0.45(k). The Civil Rights Division has responsibility for discrimination claims under the 1986 reforms.

4-1.300 Division of Responsibility Between the Civil Division and the United States Attorneys for the Handling of Civil Litigation

The responsibility of the Attorney General for civil litigation which has been delegated to the Assistant Attorney General for the Civil Division (USAM 4-1.200), has in a great many instances been redelegated to the United States Attorneys (28 C.F.R. § 0.168). Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, presently details this redelegation of authority to United States Attorneys, 60 Fed. Reg. 17456 (1995). Where authority for direct handling has been redelegated to the United States Attorneys, they are authorized to take all necessary steps to protect the interests of the United States without prior approval of the Assistant Attorney General, Civil Division, or his/her representative (*see* Directive 14-95 §§ 4(a) and 4(b)), except as may otherwise be specified in a redelegation letter or as provided in Directive 14-95, §§ 4(a) and 4(b). Compromise or closing of such redelegated cases is handled as set forth in USAM 4-3.000.

A great number of matters not specifically delegated to the United States Attorney will, in fact, be handled in the field by the United States Attorney's Office (USAO) under the supervision of the Assistant Attorney General of the Civil Division. Liaison between the United States Attorneys and the Civil Division on such cases is discussed at USAM 4-1.513. If an agency makes an emergency referral or request as to the nondelegated case to the USAO, and the United States Attorney is satisfied that the requested action is proper but time does not permit contact with the Civil Division, protective action should be taken by the United States Attorney. *See* USAM 4-1.514.

4-1.310 Direct Referral Cases

Pursuant to section 4(a) of Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), and subject to the limitations of section 4(c), the following civil actions under the jurisdiction of the Assistant Attorney General, Civil Division, may be referred by the agency concerned directly to the United States Attorney for handling in trial courts, and United States Attorneys have been delegated the authority to take all necessary steps to protect the interests of the United States, without prior approval of the Assistant Attorney General, Civil Division, or his/her representatives. Agencies may, however, if special handling is desired, refer these cases to the Civil Division. Also, when constitutional questions or other significant issues arise in the course of such litigation, or when an appeal is taken by any party, the Civil Division must be consulted.

- A. Money claims by the United States (except penalties and forfeitures) where the gross amount of the original claim does not exceed \$1 million.
- B. Single family dwelling house foreclosures arising out of loans made or insured by the Department of Housing and Urban Development, the Department of Veteran Affairs and the Farmer's Home Administration, now called the Rural Housing and Community Development Service (RHCDS).
- C. Suits to enjoin violations of, and to collect penalties under the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1376; Packers and Stockyards Act, 7 U.S.C. §§ 203, 207(g), 213, 215, 216, 222, and 228a; Perishable Agricultural Commodities Act, 1930, 7 U.S.C. §§ 499c(a) and 499h(d); Egg Products Inspection Act, 21 U.S.C. § 1031, *et seq.*; Potato Research and Promotion Act, 7 U.S.C. § 2611, *et seq.*; Cotton Research and Promotion Act of 1966, 7 U.S.C. § 2101, *et seq.*; Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*; and Agricultural Marketing Agreements Act of 1937, *as amended*, 7 U.S.C. § 671, *et seq.*
- D. Suits by social security beneficiaries under the Social Security Act, 42 U.S.C. § 402, *et seq.*
- E. Social security disability suits under 42 U.S.C. § 423, *et seq.*
- F. Black lung beneficiary suits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 921, *et seq.*
- G. Suits by Medicare beneficiaries under 42 U.S.C. § 1395ff.

- H. Garnishment actions authorized by 42 U.S.C. § 659 for child support or alimony payments and actions for general debt under 5 U.S.C. § 5520a.
- I. Judicial review of actions of the Secretary of Agriculture under the food stamp program, pursuant to the provisions of 7 U.S.C. § 2023 involving retail stores.
- J. Cases referred by the Department of Labor solely for the collection of penalties or for injunctive action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*, and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*
- K. Cases referred by the Department of Labor solely for collection of civil penalties under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2048.
- L. Cases referred by the United States Postal Service for injunctive relief under the non-mailable matter laws, 39 U.S.C. § 3001, *et seq.*

4-1.312 Delegated Cases

Where the circumstances warrant, the Assistant Attorney General, Civil Division, may delegate to United States Attorneys pursuant to section 4(b), Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), suit authority for any claims or suits where the gross amount of the original claim does not exceed \$5 million, upon the recommendation of branch, office, or staff directors. United States Attorneys may compromise any case redelegated under section 4(b) in which the gross amount of the original claim does not exceed \$5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,000,000. All delegations pursuant to section 4(b) must be in writing, and no United States Attorney has authority to compromise or close any such delegated case or claim except as is specified in the required written delegation or in section 1(e) of the Directive (discussed below at USAM 4-3.120). The limitations of section 1(e) of the Directive (discussed below at USAM 4-3.130) also remain applicable in any case or claim delegated under section 4(b).

4-1.313 Retained Cases

Pursuant to section 4(b) of the Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), and regardless of the amount in controversy, the following matters will normally not be delegated to the United States Attorneys for handling but will be personally or jointly handled or monitored by the appropriate branch or office within the Civil Division:

- A. Civil actions in the United States Court of Federal Claims;
- B. Cases within the jurisdiction of the Commercial Litigation Branch involving patents, trademarks, copyrights, etc.;
- C. Cases before the United States Court of International Trade;
- D. Any case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office, or any fraud or False Claims Act case where the amount of single damages exceeds \$1 million.
- E. Any case involving vessel-caused pollution in navigable waters;
- F. Cases on appeal, except as determined by the Director of the Appellate Staff (*see* USAM, Title 2);
- G. Any case involving litigation in a foreign court;
- H. Criminal proceedings arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, and the National Highway Traffic Safety

Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation;

I. Non-monetary civil cases, including injunction suits, declaratory judgment actions, and applications for inspection warrants, and cases seeking civil penalties, including, but not limited to those arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, and the National Highway Traffic Safety Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation.

J. Asbestos and other toxic tort litigation (i.e., Agent Orange, lead, groundwater contamination, etc.)

K. Administrative claims arising under the Federal Tort claims Act.

4-1.320 United States Attorney Responsibilities -- Assistance Concerning Deposited Funds

In connection with the distribution of funds deposited in court, the United States Attorney may be asked to assist the court as *amicus curiae*. In the case of petitions for the return of funds of deceased or deserting sailors pursuant to 46 U.S.C. §§ 626 to 628, copies of the petition should be served on the United States Attorney, the Attorney General, and the United States Shipping Commissioner. In such cases, the United States Attorney should appear as attorney for the United States as another claimant to the funds. Information for use in asserting the government's claim will be provided by the United States Shipping Commissioner attached to the Coast Guard at the locale.

4-1.322 United States Attorney Responsibilities -- Assistance to Civil Division Attorneys

From time to time, Civil Division attorneys involved in the handling of litigation, including litigation before specialized courts, may need to perform their duties at places within various judicial districts. Such attorneys are asked to apprise the United States Attorney in advance of their visit to his/her district. United States Attorneys are requested to aid such attorneys in obtaining office space, stenographic facilities, and related assistance on request, when this is feasible.

4-1.323 United States Attorney Responsibilities -- Briefs Amicus Curiae

An action in a state or federal court, to which neither the United States nor one of its officers or agencies is a party, may involve an issue affecting the interests of the United States. When the interpretation or application of an Act of Congress or a departmental regulation or the Attorney General's authority to conduct litigation is involved, the Department may wish to file a brief *amicus curiae* to inform the court of the government's position. *Cf. F.T.C v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958). United States Attorneys are requested to notify the Civil Division promptly whenever they learn of such cases. If an *amicus* brief is filed, the Civil Division will forward a copy of the brief to the United States Attorney in the district in which the suit is pending.

4-1.324 United States Attorney Responsibilities -- Constitutional Questions -- Certification to the Attorney General

In any action, suit, or proceeding in a court of the United States, to which the United States or an agency or employee thereof is not a party, the court is required to certify to the Attorney General when the constitutionality of an Act of Congress is called into question, and the court must permit the United States to intervene to submit

evidence or argument on the issue of constitutionality. *See* 28 U.S.C. § 2403. The Civil Division should be promptly advised of any case in which the United States Attorney learns that the pleadings challenge the constitutionality of an Act of Congress, a regulation or any other federal action.

4-1.325 United States Attorney Responsibilities -- Judicial Assistance to Foreign Tribunals

Section 1782 of Title 28 authorizes the United States district court for the district in which a person resides or is found to order such person to give his/her testimony or to produce documents or other things for use in a proceeding in a foreign or international tribunal. Requests for international judicial assistance are executed either on the basis of treaty obligations assumed by the United States (*see*, e.g., the Convention between the United States and other Governments on the Taking of Evidence Abroad in Civil and Commercial Matters, TIAS 7444, 23 UST 2555) or on the basis of international comity and courtesy. Requests for international judicial assistance from foreign tribunals in civil matters will be referred to United States Attorneys by the Office of Foreign Litigation, Civil Division. *See* 28 C.F.R. § 0.49. United States Attorneys should not attempt to execute foreign evidence requests in civil cases without obtaining the approval of the Office of Foreign Litigation.

In addition to processing evidence requests, the Office of Foreign Litigation also performs the functions of the "Central Authority" under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Cases, TIAS 6638, and the Inter-American Convention on Letters Rogatory, *Treaties in Force, U.S. Department of State*, 351 (1993). USAOs will only infrequently become involved in service requests, which are referred to the United States Marshals Service for execution.

4-1.326 United States Attorney Responsibilities -- Protection of the Government's Fiscal and Property Interests

United States Attorneys are requested to report any infringement of, or dereliction with respect to, the property or other interest of the United States warranting the institution of civil proceedings, when such matters have not been referred for handling. Most non-fraud claims normally should be processed for collection by the administrative agency involved, pursuant to the Debt Collection Act, 31 U.S.C. § 3711, and implementing joint regulations, 4 C.F.R. §§ 101.1 to 105.5. *See* USAM 4-4.430, *infra*.

Non-fraud claims should normally be reported to the affected administrative agency. Fraud claims are excluded from the coverage of the joint regulations implementing the Debt Collection Act. *See* 31 U.S.C. § 3711(c)(1). United States Attorneys should be particularly alert to report to the Civil Division all claims involving fraud against the government that are not within the United States Attorneys' original authority, and all claims involving bribery, and the conversion of government property.

4-1.327 Settlement of Tort Claims Asserted Against the Department of Justice Administratively

In cases involving serious personal injuries, death, or major property damage, as to which a claim may possibly be asserted against the Department of Justice under the Federal Tort Claims Act, the responsible component should be notified as soon as possible after the accident and asked to cause an investigation to be commenced. Any tort claim arising from any USAO's employee's acts or omissions should be forwarded to EOUSA. Any tort claim alleging acts or omissions on the part of any other government employee should be forwarded to the appropriate agency.

4-1.410 Responsibilities of Client Agencies -- Compromise and Dismissal or Closing

Authority over the disposition of a civil matter, once it is referred to the Department of Justice, resides in the Attorney General or his/her delegate, and the client agency may not control its handling or disposition. *See United States v. Sandstrom*, 22 F. Supp. 190, 191 (N.D. Okla. 1938); *FTC v. Guignon*, *supra*; E.O. 6166 § 5, June 10, 1933. In rare cases a statute may provide continuing settlement or other authority in the referring agency. Cf. 28 U.S.C. § 2348. An agency's recommendation (which may be couched in terms such as "we have accepted the offer of settlement," for example) should not be construed as an acceptance but rather only as a recommendation. Such powers as other officials of the government had theretofore with respect to litigation were withdrawn by E.O. 6166, June 10, 1933, leaving the Attorney General with complete authority. *See Duncan v. United States*, 39 F. Supp. 962, 964 (W.D. Ky 1941); *Aviation Corp. v. United States*, 46 F. Supp. 491, 494 (Ct. Cl. 1942), *cert. denied*, 318 U.S. 771 (1943); 38 Op. Att'y Gen. 124, 125. Where the authority of the Attorney General has been redelegated to United States Attorneys, and the client agency involved objects to the compromise, dismissal, or closing, the case may not be compromised, dismissed, or closed without the consent of the Assistant Attorney General of the Civil Division. "Consult" within the meaning of Civil Division Directive 14-95, means to discuss with the agency in good faith, in order to decide or plan an appropriate course of action. In Tort cases, although all agencies should be consulted, the agency "involved" for purposes of requiring referral to the Assistant Attorney General, Civil Division does not construe "agency or agencies involved" to ordinarily encompass the agency whose acts or omissions gave rise to the tort since the agency is not a proper party to an FTCA suit.

4-1.420 Responsibilities of Client Agencies -- Court Appearances

No suit may be brought on behalf of the government, absent an unusual express statutory authorization, except by the Attorney General or an attorney under his/her supervision. *See Sutherland v. International Ins. Co.*, *supra*; E.O. 6166 § 5, June 10, 1933. Accordingly, in matters assigned to United States Attorneys for handling, the responsibility is that of the United States Attorney, and that responsibility may not be delegated to agency counsel.

The same principles apply when the government (through government corporations or the Maritime Administration) enjoys the benefit of insurance. Underwriters may nominate trial counsel. However, such trial attorneys are only "of counsel" to the United States Attorney. They do not control or direct the conduct of cases, which must remain with the United States Attorney. The United States Attorney or one of his/her assistants should monitor the course of such litigation carefully.

4-1.430 Responsibilities of Client Agencies -- Litigation Reports

Agency personnel are generally in the best position to know the facts involved in a case arising in connection with the activities of their agency. Agency counsel should have a great familiarity with agency practices and the statutes and regulations of the agency which may be relevant to a particular case. Obviously, records of the agency relevant to the case can best be assembled and certifications obtained by agency counsel. Thus, it has been the policy of the Division that the involved agencies be asked to provide litigation reports and recommendations as to any affirmative relief which should be requested or defenses which should be asserted.

In cases being directly handled by Assistant United States Attorneys, agency counsel should be instructed to furnish copies of litigation reports directly to the USAOs. Copies of litigation reports should also be furnished to Civil Division components that request them. In suits brought against the government, United States Attorneys are encouraged to make early contact with appropriate agency counsel. Excessive delays by government agencies

in furnishing litigation reports should be brought to the attention of the Assistant Attorney General for the Civil Division.

4-1.440 Responsibilities of Client Agencies -- Pleadings and Interrogatories

Agency counsel may offer to prepare suggested pleadings and papers for civil cases. It is appropriate to receive such suggestions, or even to request agency preparation of suggested pleadings and papers, if this will facilitate the disposition of litigation rather than delay it. However, agency counsel are not required to provide this service. Pleadings and papers prepared by agency counsel should be critically examined, and rewritten as necessary, to assert the proper litigating position for the government and conform with proper practice and local rules.

Agency representatives generally should prepare the answers to interrogatories and sign such answers. *See* Fed. R. Civ. P. 33. Agency answers to interrogatories, if any, should not be submitted to the court pro forma, but should be critically examined, and recast if necessary, to reflect accurately the facts and the appropriate litigating position which should be taken under the circumstances.

4-1.450 Responsibilities of Client Agencies -- Referrals

Agency referrals for litigation should be accompanied by sufficient information, whether in the form of a litigation report or otherwise, to permit an intelligent evaluation of the factual and legal merits of the case. Agency counsel should be alert to apprise the Department of anticipated defenses, their strengths, and the best rebuttal to them. Non-fraud referrals for the recovery of money should comply with the Federal Claims Collection Standards (*see* 4 C.F.R. §§ 101.1 to 105.5) implementing the Debt Collection Act, 31 U.S.C. §§ 3701 to 3720A. Where they involve amounts coming within the United States Attorneys' authority, the referrals should be made by the agencies directly to the National Central Intake Facility. Referrals of cases in excess of the United States Attorneys' authority should be made through the Civil Division.

4-1.500 Liaison of United States Attorneys with Civil Division

The degree of liaison which should be maintained with the Civil Division varies substantially from one type of case to another. Most civil cases, claims, and judgments have been delegated to the United States Attorneys for handling, though the Assistant Attorney General for the Civil Division remains responsible for their effective handling. Little liaison is required as to these cases. However, the Civil Division remains ready to advise and assist on these cases upon request.

Significant matters of policy, important questions of first impression, serious differences of views with client agencies, and adverse court decisions, should be brought to the attention of the Civil Division, regardless of the amounts involved, the method of referral, or whether the case is delegated or nondelegated. The Civil Division will communicate with client agencies to effect changes, clarification or consistency in policies, endeavor to make available the latest precedents which may not otherwise be available, attempt to assure reasonable uniformity of positions and procedures among United States Attorneys, advise whether particular cases should be used to test new propositions, and make available expertise developed in certain specialties over the years.

4-1.511 Cases Delegated to United States Attorneys

Although the Civil Division does not monitor the conduct of delegated cases and, with the exceptions set forth below, is not to be advised of litigation events in such cases, the Civil Division stands ready to advise and assist on these cases. Communications regarding delegated cases should be directed to the section or unit in the Civil Division bearing responsibility for the particular type of case.

Copies of pleadings and other communications on delegated cases are not to be furnished to the Civil Division routinely, except that the Torts Branch should always be advised of the date and method of disposition of suits under the Federal Tort Claims Act, and be furnished copies of the order, opinion, or stipulation which resulted in the disposition of the suit, and that the Office of Immigration Litigation should always be similarly advised of the disposition of suits under the Immigration and Nationality Act, as amended. Also, with regard to qui tam False Claims Act cases, the Fraud Section of the Commercial Litigation Branch should be notified of (1) a decision whether the government has intervened, or declined to intervene, in the case, (2) any legal or procedural issues that arise concerning the qui tam provisions, (3) settlement proposals by the parties and (4) the resolution of the case. The Division generally has no individual files on delegated cases. Therefore, inquiries directed to the Division on these cases should be accompanied with sufficient background, copies of pleadings, and briefs, to permit an informed appraisal of the nature and posture of the case and the problem. If the United States Attorney has had a previous communication on a particular case or on a general problem, the file numbers and initials or names appearing in the upper corner of the Civil Division's last communication should be used when writing the Department again. Disposition of delegated cases, like the disposition of nondelegated cases, must be accurately reported on the Department's statistical reporting system. In particular, all money and property collected for the government should be reported. Advice (in writing) of final, appealable adverse court rulings and orders, and a recommendation as to appeal, with supporting documents and explanation, must be promptly furnished to the appropriate Branch Directors.

Cases in which an interlocutory appeal may be desirable pursuant to 28 U.S.C. § 1292 should be discussed with the Appellate Staff telephonically, in order that the proper certification can be obtained on a timely basis if it appears that strong consideration will likely be given to such an appeal. Final appealable orders whose review will be by the United States District Court, as in bankruptcy cases, or by trial de novo in a state tribunal, should be reported to the Branch (rather than the Appellate Staff) having cognizance of that type of litigation, preferably by telephone. Prompt determinations as to appeal will be quickly communicated to the United States Attorneys in these short-deadline cases.

See USAM, Title 2, for procedures pertaining to adverse decisions in individual cases in which the claim is for benefits under the Social Security Act.

4-1.512 Cases Monitored by Civil Division

In cases referred by the Civil Division to the United States Attorney for handling on a monitored basis, the United States Attorney is to advise the Civil Division of the ultimate disposition of the case and furnish a copy of any compromise or closing memorandum. If such a case is transferred to another judicial district, a copy of the memo transferring papers on the case should be furnished to the Civil Division. In False Claims Act cases, authority must be obtained from the Civil Division to file suit, close, or settle a monitored case. In foreclosure actions, United States Attorneys must promptly advise the Civil Division in writing of the dates of:

- A. The filing of the complaint;
- B. Entry of an order placing the client agency in possession as mortgagee in possession or appointing a receiver, as the case may be;
- C. The entry of a judgment or foreclosure decree;
- D. Sale of the mortgaged property; and
- E. The delivery of the marshal's deed to the client agency or other successful purchaser.

If there exists any conflict between these instructions and the terms of an initial letter referring the case from the Civil Division to the United States Attorney, the procedures outlined in the referral letter should be followed.

In monitored cases, attorneys of the Civil Division will assist in the discussion of legal and factual problems, briefing, and trial, to the extent that time will permit. The Civil Division must be kept currently advised concerning developments in non-delegated cases.

All complaints served upon the United States Attorneys in non-delegated cases must be promptly dispatched to the Civil Division. Unless the Civil Division requests a more formal or expedited means of communication because of the sensitive nature of a case or for other reasons, it is suggested that most other developments can be reported currently by mailing copies of communications, pleadings, briefs, orders, etc., without a covering memo but with the Department of Justice file number and the name of the Civil Division branch written on an upper corner thereof. In the case of an offer in compromise or other written communication which should have expedited attention, a red slip reading "SPECIAL" or "IMPORTANT AND URGENT" can be stapled to the communication. If it is important that the communication bypass the Department of Justice mail room, the envelope should be clearly marked "PERSONAL-DO NOT OPEN IN MAIL ROOM." Alternatively, such communication can be directly mailed to the Post Office Box of the Civil Division component responsible for the litigation.

If the complaint against the government fails to identify the government agency or agencies involved, this information should be obtained telephonically from plaintiff's counsel and relayed to the Civil Division. Care should be taken to obtain an appropriate extension of time, if a pleading date cannot be met.

In complex, major, or sensitive cases, such as medical malpractice litigation and aviation crash litigation, pre-trial agreements under Rule 16, Federal Rules of Civil Procedure, proposed stipulations of fact or findings and conclusions, and judgments, should be reviewed by the Civil Division only at the request of a United States Attorney or if the proposed stipulations are tantamount to a stipulation of liability. In any event, care should be taken with respect to stipulations and pre-trial agreements that foreclose the government's assertion of an available position.

The "discretionary function" defense in FTCA suits should be discussed with the applicable component of the Torts Branch before it is asserted. If there is any question as to which component is involved, contact the FTCA Staff. In Freedom of Information Act and Privacy suits, the Federal Programs Branch of the Civil Division (202-514-3354) must be advised of all developments. Copies of all papers filed must be promptly sent to the Branch. Special contact should be made with the Branch Director (202-514-3354) or with the Assistant Branch Director (202-514-3395) in charge of the area if in camera inspection is demanded or considered in FOIA suits. If a stay of an order couched in terms of an injunction is refused in either a FOIA or Privacy Act suit, pending a determination as to appeal, both the Branch and the Appellate Section (202-514-3311) should be notified at once.

In admiralty cases, correspondence with the Torts Branch or its field offices should include in the caption the name of the vessel involved.

4-1.513 Cases Personally Handled by the Civil Division or Jointly Handled With United States Attorneys' Offices

Some cases will be the responsibility of the Civil Division. When a case is being handled by a Civil Division attorney, the United States Attorney shall assign an Assistant United States Attorney to act as local counsel. The local counsel shall assist the Civil Division attorney in some, or all, of the following ways:

- A. advising Civil Division counsel of local rules and procedures;
- B. signing court filings, if required by local court rules;
- C. immediately notifying Civil Division counsel of court orders;
- D. attending court hearings or conferences; and
- E. providing assistance in the litigation of the case if necessary.

Some cases, particularly in the fraud and other affirmative enforcement areas, will be handled jointly by attorneys from the Civil Division and a USAO. In such cases, the attorneys will coordinate their efforts in a manner which maximizes the efficient use of Departmental resources. In these instances, the Civil Division must authorize filing suit, closing or settling the case.

4-1.514 Emergency Referrals in Nondelegated Cases

Client agencies are counseled to process cases sufficiently in advance of deadlines to avoid the necessity of "emergency referrals." Nonetheless there will be cases in which "emergency referrals" are required from time to time, as well as injunction actions against government officials and other proceedings, in which emergency action or representation is necessary. Frequently these "emergencies" are cleared telephonically with the Civil Division by the client agency. United States Attorneys are

authorized to take appropriate action to protect the government's interests in an emergency, without prior authorization from the Civil Division. Copies of papers filed or received in connection with such emergency action, and an explanation, should be forwarded as soon as possible. Representation should not be afforded a government officer, member of the armed forces, or employee sued personally for money damages for acts done within his/her official duties, without authorization from the Civil Division pursuant to 28 C.F.R. Part 15. The employee must submit a written request to his/her agency for representation by the Department, and the agency must submit a written request to the Department.

4-1.520 Liaison of United States Attorneys with Client Agencies

Whenever a case involves an agency of the United States as a client of the USAO it shall be the responsibility of the Division or United States Attorney to ensure that the client agencies are kept fully informed of case progress, developments and decisions.

The following steps are recommended as a means toward that end:

- A. Promptly upon receipt of a complaint against an agency, the Division or USAO, as appropriate, should mail a notification letter to the General Counsel of the agency or to his/her designee. (Where time does not permit, e.g., where a motion for a TRO has been filed, it may be necessary to notify the agency by telephone.) At the same time, or as soon thereafter as possible, the agency should be provided with the name(s) and telephone number(s) of the Department or USAO attorney(s) to whom the case has been assigned. The agency should be requested, in turn, to provide the assigned attorney(s) with the name, direct mailing address, and telephone number of the agency attorney to whom communications with respect to the case should be directed.
- B. With respect to affirmative cases, receipt of a referral from a client agency should be acknowledged promptly and names of attorneys exchanged as in Paragraph A.
- C. Unless reasons of economy indicate otherwise, copies of all significant documents filed in court in both defensive and affirmative cases should be sent, immediately upon receipt or service, to the client agency. If a client agency specifically requests, copies of all documents filed should be sent. (Service of a summons and complaint on the client agency may normally be assumed, and copies of exhibits forwarded by the client agency need not be reproduced and returned.)
- D. In nondelegated cases, the United States Attorney should also send copies of all documents filed in court to the Division responsible for the case.
- E. An agency should be notified in advance of any significant hearings, oral arguments, depositions, or other proceedings.
- F. Appropriate steps should be taken to consult adequately with agencies in advance regarding positions we intend to urge in court. Under no circumstances should a case be compromised or settled without advance

consultation with a client agency, unless the agency has clearly indicated that some other procedure would be acceptable.

4-1.600 Prior Approvals

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